

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**October 22, 2014**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2014AP1237-FT**

**Cir. Ct. No. 2013SC3959**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**JAMIE R. DAVILA,**

**PLAINTIFF-APPELLANT,**

**V.**

**NATIONAL MUFFLER & FOOD MART, INC. P/K/A NATIONAL MUFFLER  
& BRAKE,**

**DEFENDANT-RESPONDENT.**

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APPEAL from a judgment of the circuit court for Racine County:

JOHN S. JUDE, Judge. *Affirmed.*

¶1 REILLY, J.<sup>1</sup> Jamie R. Davila appeals from a judgment dismissing his breach of contract claim against National Muffler & Food Mart, Inc. (National). Davila contends that the trial court erred by not awarding him the amount he paid to a third party to perform the work that he had hired National to perform. We affirm the trial court. Davila's contract with National called for National to manufacture a product that met national certification standards, and when an inspection found that an adjustment was needed to the product before certification would be granted, Davila's remedy for the breach was the cost of the adjustment. As Davila offered no evidence as to the cost of the adjustment, the court properly dismissed his action against National.

### **BACKGROUND**

¶2 Davila owns a 1997 Honda Civic Si that he uses to drag race on tracks governed by the rules of the National Hot Rod Association (NHRA). In order to participate in NHRA events, the chassis on Davila's car needs to be certified that it complies with certain safety requirements. Davila hired National to install a roll cage in his car guaranteed to achieve NHRA chassis certification. National installed a roll cage that achieved NHRA certification, and Davila wrote a check to National for the work, which was valued at \$2169.02. However, Davila subsequently discovered problems with National's workmanship and stopped payment on the check.

¶3 Davila had National remove the roll cage and put a new one in his car. National agreed to do the second installation for Davila for the original price

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

minus a \$500 discount and also agreed to refund him \$180 for certification expenses. The second roll cage failed to receive certification. The certification inspector indicated in his report that the failure was due to a driver's side bar that was "too low for driver." Davila subsequently took his car to a third party, which charged \$3244.80 to remove the old roll cage and install a new one. The new roll cage achieved certification.

¶4 Davila sued National for breach of contract, seeking a refund of the amount he paid for the second roll cage installation and compensation for the third roll cage installation.<sup>2</sup> Following a court trial, the trial court found Davila and National had a contract that guaranteed installation of a roll cage that met NHRA certification standards and that National had ultimately breached the contract when the second installation failed to achieve certification due to a driver's side bar that was installed too low.

¶5 The court acknowledged that Davila had presented evidence of other problems with National's work on the second installation, but found "there is no evidence that those problems would have resulted in a lack of certification" as it was "logical" that the inspector would have noted "all the corrections that were needed for certification" in his report. The court found credible National's testimony that it would have repositioned the side bar if Davila had made it aware of the certification problem and returned the car. As such, the court ruled that because Davila had not allowed National to remedy the breach and had not provided evidence of the itemized cost of repairing the side bar, Davila was not

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<sup>2</sup> Davila also claimed National damaged his car while in its care. That issue is not before us on appeal.

entitled to a refund from National or payment for the third roll cage. Davila appeals.

### STANDARD OF REVIEW

¶6 We review the factual findings of the trial court under the clearly erroneous standard, *Steele v. Pacesetter Motor Cars, Inc.*, 2003 WI App 242, ¶10, 267 Wis. 2d 873, 672 N.W.2d 141, and defer to the trial court's superior position in weighing testimony, assessing the credibility of the witnesses, and resolving conflicts in testimony, *Tang v. C.A.R.S. Prot. Plus, Inc.*, 2007 WI App 134, ¶19, 301 Wis. 2d 752, 734 N.W.2d 169. We are reluctant to interfere with a damage award, but we will independently review a damage award where the trial court's analysis of the evidence supporting an award is inadequate. *Herman v. Milwaukee Children's Hosp.*, 121 Wis. 2d 531, 545, 361 N.W.2d 297 (Ct. App. 1984).

### DISCUSSION

¶7 Davila challenges the trial court's determination that he was not entitled to money damages. First, he challenges the court's factual finding that the second installation resulted in only one defect responsible for the roll cage's failure to receive certification. Based on this challenge, he next contends that the trial court erred in determining that he was entitled to the repair costs for the one defect and not the amount he that he ultimately paid for an entire third roll cage installation by another vendor. Finally, he argues that the court erroneously determined that he should have returned his car to National for repairs after the second installation failed to receive certification. We disagree that the court erred in making these determinations.

¶8 In challenging the trial court’s finding that there was only one defect that prevented the second roll cage installation from achieving certification, Davila contends that the trial court should not have assumed that the inspector would have listed every reason for the roll cage’s failure on his report as that assumption ignored his own testimony as well as that of his expert witness that there were other problems with the second installation. Neither Davila nor his expert, however, testified that these other alleged defects would have prevented certification, which was what the court found to be the breached term of the contract. The only evidence that Davila presented as to why the second installation failed certification was the inspection report, and the only reason listed for the failure on that report was the low driver’s side bar. The court did not clearly err in finding that was the only reason that the second roll cage failed to achieve certification.

¶9 The court also did not err when it declined to award compensation to Davila for the breach. As noted by the trial court, Davila’s sole evidence of his damages related to the breach was an invoice for a complete redo of National’s work in which the costs “were not itemized or broken out.” Davila acknowledges that there are multiple ways of calculating damages, including the cost to repair or restore property or to compensate for property’s diminished value, and that the plaintiff is entitled to the smallest amount necessary to recover for an actual loss. *See Champion Cos. of Wis., Inc. v. Stafford Dev., LLC*, 2011 WI App 8, ¶¶11-12, 331 Wis. 2d 208, 794 N.W.2d 916 (2010). Nevertheless, Davila argues that the trial court should have awarded him the cost of replacing the entire roll cage as that replacement “solved the many issues with the second roll cage.” We disagree.

¶10 The trial court did not err when it found that the only reason the second roll cage failed to achieve certification, and therefore fulfill the contract,

was due to the placement of the driver's side bar. The court further found, based on testimony by National, that this would have involved "a simple fix," not a complete reinstallation. We defer to the trial court in this credibility assessment. *Tang*, 301 Wis. 2d 752, ¶19. Accordingly, we conclude that the trial court appropriately limited Davila's recovery to the costs of repairing the driver's side bar as it put Davila in as good a position as if the contract had been fully performed. See *Champion Cos.*, 331 Wis. 2d 208, ¶11. Davila, however, offered no evidence as to the cost to raise the side bar. This failure to provide an exact and accurate cost for the repair work prevented the court from awarding damages. See *Plywood Oshkosh, Inc. v. Van's Realty & Constr. of Appleton, Inc.*, 80 Wis. 2d 26, 32, 257 N.W.2d 847 (1977).

¶11 We reject Davila's final contention—that the court erroneously determined that he should have returned his car to National for repairs after the second installation failed to receive certification—as Davila misreads the decision to require that he provide National with notice and an opportunity to cure before bringing his action against National. We do not view the court's decision that way. We see the court's contemplation of returning the car to National for repairs to the defective driver's side bar as one remedy (i.e., specific performance) that might have been available to Davila for the breach. See *Ash Park, LLC v. Alexander & Bishop, Ltd.*, 2010 WI 44, ¶41, 324 Wis. 2d 703, 783 N.W.2d 294. By the time he brought this action, however, Davila already had a new roll cage installed by a third party and the remedy of returning the car to National for repair was no longer an option.

¶12 Regardless, the court's decision on this point was inconsequential as Davila did not meet his burden of proof as he offered no evidence as to the cost of

repositioning the driver's side bar. Thus, the trial court properly dismissed Davila's breach of contract claim for failure to prove these damages.

*By the Court.*—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

